PROCEEDINGS AND ORDERS

DATE: [03/23/88]

CASE NBR: [87100133] [CFX]
SHORT TITLE: [Buchanan, Marcilyn, etc.]
VERSUS [Stanships, Inc., et al.]

CASE STATUS: [ ]
DATE DOCKETED: [070687]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jul 6 1987		Petition for writ of certiorari filed.
Jul 9 1987		Order extending time to file response to petition until August 28, 1987.
Aug 18 1987		Brief of respondents Stanships, Inc., et al. in opposition filed.
Aug 26 1987		DISTRIBUTED. September 28, 1987
Oct 5 1987		The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 28 1987		Brief amicus curiae of United States filed.
Jan 6 1988		REDISTRIBUTED. January 22, 1988
Feb 8 1988		REDISTRIBUTED. February 19, 1988
Feb 22 1988		REDISTRIBUTED. February 26, 1988
Mar 15 1988		REDISTRIBUTED. March 18, 1988
Mar 21 1988		Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Marshall. Opinion per

Last page of docket
SHOW

PROCEEDINGS AND ORDERS

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PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
Mar 21 1988		Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Marshall. Opinion per curiam.

2

DATE: [05/10/88]

PAGE: [01]

PROCEEDINGS AND ORDERS

Jun 22 1987 Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.

Jul 22 1987 Motion of appellee Dickinson Public Schools to dismiss filed.

Jul 22 1987 Motion of appellee North Dakota to dismiss filed.

Jul 23 1987 DISTRIBUTED. September 28, 1987

Oct 16 1987 PROBABLE JURISDICTION NOTED.

Nov 4 1987 Order extending time to file brief of appellant on the merits until December 23, 1987.

Nov 10 1987 Joint appendix filed.

Dec 2 1987 Brief of appellants ROLO, et al. filed.

Dec 2 1987 Brief of appellants Paul Yoder, et al. filed.

Dec 3 1987 Brief amici curiae of Children's Defense Fund, et al. filed.

Dec 7 1987 Order extending time to file brief of appellee on the merits until January 19, 1988.

Motion of North Dakota for leave to participate in oral argument as amicus curiae and for divided argument filed.

Motion of appellee Dickinson Public Schools to dismiss filed.

Record filed.

Jan 11 1988 Brief of appellants in response to motion to dismiss filed.

Motion of appellees to dismiss appeal filed.

DISTRIBUTED. Jan. 8, 1988. (Motion of appellees to dismiss appeal).

Motion of North Dakota for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Motion of appellees to dismiss appeal DENIED.

Brief amicus curiae of North Dakota filed.

Brief of appellee Dickinson Public Schools filed.

Brief amicus curiae of United States filed.

ORAL ARGUMENT, Wednesday, March 30 (1st and 2nd case).

Reply brief of appellant Paul Yoders filed.

ARGUED.

BEST AVAILABLE COP

87-133 (1)

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MERCILYN BUCHANAN, ET AL
Petitioner

VERSUS

STANSHIPS, INC., ET AL
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Elliott W. Atkinson, Jr.
Roy Maughan
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1755 Wooddale Blvd.
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(504) 926-8533

Counsel for Mercilyn Buchanan

35pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of the following procedural questions:

I. Is the clerk's failure to include a provision in the judgment for costs in favor of the prevailing party a clerical error to be remedied under the provisions of Fed.R.Civ.P. 60(a)?

II. Is a prevailing parties' post judgment motion to tax allowable costs pursuant Fed.R.Civ.P. 54(d) a Fed.R.Civ.P. 60(a) motion?

III. Should a prevailing party's post judgment Motion to Tax Allowable Costs pursuant Fed.R.Civ.P. 54(d) be considered as a Fed.R.Civ.P. 59(e) motion for purposes of appeal?

IV. Does a prevailing parties' post judgment motion to tax cost pursuant Fed.R.Civ.P. 54(d) trigger Fed.R.App.P. 4(a)(4) and nullify a timely appeal?

V. Did the Fifth Circuit err in holding the prevailing parties' post judgment motion to tax cost nullified plaintiff's timely appeal?

LIST OF PARTIES

The interested parties to the Fifth Circuit proceedings were:

1. Stanships, Inc.
2. Trident Steamship Co., Ltd.
3. Mercilyn Buchanan
4. Andreas Mark Anthony Shaw
5. Standard Shipping, Inc.
6. Gelpi, Sullivan, Carroll and Laborde

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MERCILYN BUCHANAN, ET AL

PETITIONER

VERSUS

STANSHIPS, INC., ET AL

RESPONDENTS

PETTTION FOR WRIT OF CERTIORARI

DECISIONS BELOW

This pertinent procedural history follows:

1. Buchanan v. Stanships, Inc., 744 F.2d 1070 (5th Cir. 1984) reversing Summary Judgment on behalf of defendants

2. Bench trial in Middle District of Louisiana before Honorable Frank J. Polozola on February 24, 1986

3. Judgment entered in favor of defendants, dismissing plaintiff's suit with prejudice, January 26, 1987

4. Notice of Appeal filed in the Court of Appeals for the Fifth Circuit by plaintiff, January 27, 1987

5. Defendants filed a Motion to Tax Allowable Costs, pursuant Fed.R.Civ.P. 54, January 29, 1987

6. Appeal dismissed citing Fed.R.App.P. 4(a)(4) on March 16, 1987, Buchanan v. Stanships, Inc., F.2d __, slip opinion, (5th Cir. 1987).

7. Motion for rehearing and/or reconsideration filed on April 16, 1987.

8. Rehearing refused, May 11, 1987

JURISDICTION

Jurisdiction of the trial court was based upon diversity of citizenship and upon the admiralty and maritime jurisdiction of the court, 28 U.S.C. . 1333.

This court has jurisdiction pursuant 28 U.S.C. . 1254.

STATUTES INVOLVED

This petition raised issues concerning the following provisions of the Federal Rules of Civil Procedure and Federal Rules of Appellant Procedure:

Fed.R.Civ.P.52
(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59...."

Fed.R.Civ.P.54
(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Fed.R.Civ.P.59
(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed.R.Civ.P.60. Relief from Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed.R.App.4

Appeal as of Right - When Taken
(a) Appeals in Civil Cases
(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment

would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This is a wrongful death action by a mother and minor son. After bench trial the court entered judgment for the defendants with no provision in the judgment for cost in favor of the prevailing party pursuant Fed.R.Civ.P. 54(d). Plaintiff timely filed a notice of appeal. The defendants filed a motion asserted to be pursuant Rule 52 and Rule 59 to tax allowable costs making no request to amend or make additional findings. The court without a hearing, signed an order amending the judgment to allow defendants "legally taxable costs". Plaintiff did not file a new notice of appeal and defendants filed a motion to dismiss pursuant Fed.R.App.P. 4(a)(4).

The Fifth Circuit court dismissed plaintiff's appeal citing Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986), where it held that for purposes of appeal any timely filed post trial motion falls within the scope of Rule 59 (e) and triggers Fed.R.App.P. 4(a)(4) regardless of how it is styled, except motions seeking to correct purely clerical errors covered by Rule 60(a) even though such motions might be timely if filed at a later date. (Harcon Barge Co., Inc., p. 667).

The Fifth Circuit erred in holding a post judgment motion for costs by a prevailing party was for purposes of appeal a Fed.R.Civ.P. 59(e) motion to trigger Fed.R.App.P. 4(a)(4). Defendant's motion to tax allowable cost should have been classified as a motion to correct a clerical error covered by Fed.R.Civ.P. 60(a). The decision is in direct conflict with decisions in the 11th and 9th circuits.

ARGUMENT

In dismissing plaintiff's appeal the Fifth Circuit did not specifically state defendants' post judgment

motion to tax cost was a rule 59(e) motion, however, it reached that result by referring to Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., (supra) and Willie V. Continental Oil Co., 784 F.2d 706 (5th Cir. 1986) a companion case, by stating as follows in the Buchanan slip opinion:

> "As we stated in Harcon:
>
> "Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment . . . A bright-line rule is essential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal."
>
> The Harcon rule was applied to motions to Amend the Judgment regarding costs in both Harcon and the companion en banc case, Willie V. Continental Oil Co. 784 F.2d 706 (5th Cir. 1986)." Slip opinion, p. 2, 3.

It is important to note that Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., (supra), and Willie v. Continental Oil Co., (supra) involved Rule 52 post judgment motions by defendants to amend findings regarding payment of costs.

Buchanan differs and involves a post judgment motion by the prevailing party to tax allowable costs; therein lies the distinguishing factor.

The jurisprudence has uniformally classified motions for costs as Rule 60(a) motions using guidelines as stated in St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982).

> "Motions to alter or amend the judgment are those which call into question the correctness of a judgment on some material point of fact or law, and may properly be cast in the form of a motion to reconsider, to vacate, to set aside, for reargument, or for rehearing. Motions seeking mere technical changes in the form of a judgment are not Rule 59(e) motions and do not toll the time for filing notice of appeal; rather, they are akin to Rule 60(a) motions to correct clerical errors in a judgment. (citations omitted)
>
> The mere fact that judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered, should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. (citations omitted)" St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691, 693 (10th Cir. 1982).

The trial court's judgment in this case was silent on the matter of cost however, Rule 54(d) states "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Since the court did not "otherwise direct", defendants' motion to tax allowable cost neither altered, modified or changed the substance of the judgment. Defendant's motion made no request to amend findings or make additional findings and reference to Rules 52 and 59 does not change the character of the motion. Under accepted criteria, defendants' motion was a Rule 60(a) motion and not a Rule 52 or 59 motion which nullified plaintiff's timely appeal.

No cases hold a rule to tax costs by a prevailing party as a Rule 52 or 59(e) motion to trigger Fed.R.App.P. 4(a)(4) and such contentions have been rejected whenever advanced.

In Lucas v. Florida Power & Light Co., 729 F.2d 1300 (11th Cir., 1984), defendant styled its motion for

costs as a Rule 59(e) motion contending it nullified the appeal citing Fed.R.App.P. 4(a)(4).

> "A motion respecting cost is not a motion to alter or amend a judgment under rule 59. Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits. A motion for cost does not seek reconsideration of substantive issues resolved in the judgment, but relates exclusively to the collateral question of what is due because of the judgment." (citations omitted)
>
> "Rule 54(d) and 58 are the applicable rules governing the allocation of costs. Rule 54(d) of the Federal Rules of Civil Procedure provides in part that 'costs shall be allowed as of course to the prevailing party unless the court otherwise directs.' It was therefore unnecessary for the court affirmatively to direct that the prevailing defendant be allowed costs."

In Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983) defendants contended its post judgment motion styled "a Rule 59 motion" for expenses nullified the appeal. The court held "nomenclature is not controlling" and defendant's post judgment motion for expenses invoked relief under Rule 60(a) not 59(e).

> "The history of Rule 59(e) shows that 'alter or amend' means a substantive change of mind by the court. (citations omitted)

In contrast a court's failure to memorialize part of its decision is a clerical error. Power to correct clerical errors or omissions derives from Rule 60. See Rule 60(a). Unlike Rule 59(e) motion, a Rule 60 motion does not affect the validity of a previously filed notice of appeal." (citations omitted); (emphasis ours)

Campbell v. Bowlin, 724 F.2d 484 (5th Cir., 1984), held "... defendant's post judgment motion for an award of attorney's fees was improperly characterized as a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment and that, therefore, the operation of Fed. R.App. P. 4(a)(e) was never triggered."

Durham v. Kelly, 810 F.2d 1500 (9th Cir., 1987) held defendant's post judgment motion for taxable costs styled as a motion under Rule 54(d) and 59(e) did not nullify the appeal.

"We adopt as law of this circuit the rule that a motion to alter or amend a judgment to award cost does not come within Rule 59(e). Accordingly, the provisions of rule 4(a)(4) which render ineffective a notice of appeal filed during the pendency of a motion to alter or amend a judgment are inapplicable with respect to a request for reconsideration concerning costs."

Alimenta (USA) Inc. v. Anheuser-Busch Companies, 803 F.2d 1160 (11th Cir., 1986), another cost motion submitted as a Rule 59(e) motion held:

"Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute and not matters collateral to the

merits ... In the present case, Anheusers' 'Rule 59' motion in fact request the court to tax the costs of the action to the losing party. In keeping with rule 4(a)(4) of the federal rules of appellate procedure, and with the Lucas case, Alimenta's first notice of appeal is valid." (emphasis ours)

On the issue of timeliness courts have routinely applied Rule 60(a) to motion for attorney fees, prejudgment interests or costs:

White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed. 2d 325 (1982) Holding Rule 59(e) does not apply to a post-judgment motion for attorney's fees citing Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir., 1980),

"A motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."

Lee v. Joseph E. Seagram & Sons, Inc., 592 F.2d 39 (2d Cir., 1979) treated a post judgment motion for the award of interest as a clerical error under Rule 60(a). Hayden v. Scott Aviation, Inc., 684 F.2d 270 (3d Cir. 1982) applied Rule 60(a) to motion for non discretionary prejudgment interest. Dura-Wood Treating Company v.

Century Forest Industries, 694 F.2d 112 (5th Cir., 1982), a motion to correct clerical error for adjustment of attorney's fees was a 60(a) motion.

In the Matter of Cobb, 750 F.2d 477 (5th Cir., 1985), the Fifth Circuit applied F.R.C.P. 60(a) to a motion to tax cost. Spray-Rite Service Corporation v. Monsanto Company, 684 F.2d 1226 (7th Cir., 1982) held the motion to assess costs and attorney fees was a Rule 60(a) motion to correct a clerk's omission. First National Bank in Greenwich v. National Airlines, 167 F. Supp. 167 (S.D.N.Y. 1958), applied the Rule 60(a) to the post judgment motion which amended the judgment by adding "with costs to the defendants".

CONCLUSION

The jurisprudence uniformally has classified post judgment motions for costs as Fed.R.Civ.P. 60(a) motions that have never triggered Fed.R.App.P. 4(a)(4).

The holding that a post judgment motion to tax allowable costs triggers F.R.A.P. 4(a)(4) is an extension of Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., (supra) and Willie v. Continental Oil Co. (supra), which

involved post judgment motions under Rule 52 to amend substantive terms of the judgment regarding costs.

This decision reclassifies motions heretofore considered Rule 60(a) motions and is in conflict with established jurisprudence, particularly the ninth and eleventh circuits that squarely reject the contention that a motion to tax cost triggers Fed.R.App.P. 4(a)(4).

The "bright line rule" creates confusion being inconsistent with uniform jurisprudence and it raises questions regarding timeliness of filing post judgment motions for attorney fees, interest and taxable costs heretofore considered Rule 60(a) motions that now might be Rule 59(e) motions for purposes of appeal and what motions will the Fifth Circuit consider to be a purely clerical error? Might it not be the clerk's failure to include in the judgment a provision for allowable costs pursuant Rule 54(d)?

Uncertainty will be reduced and uniformity will be increased by telling the Fifth Circuit motions for allowable costs by a prevailing party are Fed.R.Civ.P. 60(a) motions to correct clerical errors or oversight that

do not trigger the provisions of Fed.R.App.P. 4(a)(4). The writ should issue to review the decision.

Respectfully submitted,

Maughan, Atkinson & Martin, Ltd.
1755 Wooddale Blvd.
Baton Rouge, LA 70806
(504) 926-8533

By: _____
Roy Maughan

By: _____
Elliott W. Atkinson, Jr.

CERTIFICATE

I CERTIFY that a copy of the above and foregoing has this date been mailed to all counsel of record by placing same in the U. S. Mail, postage prepaid.

Baton Rouge, Louisiana this 2 day of June, 1987.

_____
Roy Maughan

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL — CIVIL ACTION

VERSUS — NO. 82-128-B

STANSHIPS, INC.

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of defendant(s) and against the plaintiff(s) dismissing this suit with prejudice.

Baton Rouge, Louisiana, January 26, 1987.

s/Frank J. Polozola
UNITED STATES DISTRICT COURT

Notice Mailed
January 26, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL — CIVIL ACTION

VERSUS — NO. 82-128-B

STANSHIPS, INC.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Mercilyn Buchanan, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 21st day of January, 1987.

By Attorneys,

Maughan, Atkinson & Martin Ltd.
1755 Wooddale Blvd.
Baton Rouge, LA 70806
(504) 926-8533

By:_____
Roy Maughan

Filed U.S. District Court,
Middle District of Louisiana
January 27, 1987
Lee Dupuis, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL — CIVIL ACTION

VERSUS — NO. 82-128

STANSHIPS, INC. — SECTION "B"

MOTION TO ALTER OR AMEND JUDGMENT

NOW INTO COURT, through undersigned counsel, come Stanships, Inc. and Trident Steamship Co., Ltd., and move this Honorable Court to amend its judgment signed on January 26, 1987, to reflect that defendants are entitled to recover their taxable costs against plaintiffs. This motion is asserted pursuant to the provisions of Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. Grounds for this motion are more fully set forth in the supporting memorandum filed herewith.

Respectfully submitted,

_____
Robert P. McCleskey, Jr.
Trial Attorney

_____
Gerald T. Gelpi

Original Filed January 29, 1987
U.S. District Court
Middle District of Louisiana
Baton Rouge, La.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL	CIVIL ACTION
VERSUS	NO. 82-128
STANSHIPS, INC.	SECTION "B"

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' Motion to Alter and Amend Judgment be and is hereby granted, to reflect that defendants are entitled to an award against plaintiffs in the amount of their legally taxable costs.

Baton Rouge, Louisiana this 30th day of January, 1987.

s/Frank J. Polozola
UNITED STATES DISTRICT JUDGE

Notice Mailed
January 30, 1987

MOTION TO DISMISS APPEAL
AND INCORPORATED SUPPORTING MEMORANDUM

NOW INTO COURT, through undersigned counsel, come Stanships, Inc. and Trident Steamship Co., Ltd., defendants/appellees herein, and move this Honorable Court to dismiss the appeal of Mercilyn Buchanan, in her individual capacity and as guardian of Andreas Mark Anthony Shaw, on the following grounds:

I.

On February 24, 1986, trial of this matter was held in the United States District Court, Middle District of Louisiana, before the Honorable Frank J. Polozola. The trial lasted approximately one day, and thereafter, was taken under submission by the Court.

II.

On January 8, 1987, a minute entry, indicating plaintiffs' suit against defendants would be dismissed, was issued by Judge Polozola. Further, the minute entry stated that written reasons for the Court's ruling would be assigned, and that final judgment would be entered after filing of the written decision. (Exhibit A)

III.

On January 20, 1987, Judge Polozola rendered his written decision, setting forth the factual and legal findings supporting dismissal of plaintiffs' suit. (Exhibit B)

IV.

On January 26, 1987, Judgment was entered against plaintiffs and in favor of defendants, dismissing plaintiff's suit with prejudice. (Exhibit C)

V.

The very next day, January 27, 1987, plaintiffs filed Notice of Appeal to this Honorable Court. (Exhibit D)

VI.

On January 29, 1987, Stanships, Inc. and Trident Steamship Co., Ltd. timely filed and served their Motion to Alter or Amend Judgment under Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. Specifically, the motion requested that Judge Polozola award defendants recovery of their legally taxable costs against plaintiffs. (Exhibit E)

VII.

On January 30, 1987, Judge Polozola granted defendants' Motion to Alter or Amend Judgment and entered an Order stating defendants were entitled to an award against plaintiffs in the amount of their legally taxable costs. Thereafter, defendants submitted their Bill of Costs which was approved and taxed by the Clerk of Court on February 9, 1987. (Exhibit F)

VIII.

Rule 4(a)(1) of the Rules of Appellate Procedure states that a notice of appeal shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. However, Rule 4(a)(4)(ii) and (iii) of the Rules of Appellate Procedure specifically modify the aforementioned time period for filing of a valid notice of appeal.

IX.

Rule 4(a)(4) provides that if a timely motion under either Rule 52(b) or Rule 59 of the Federal Rules of Civil Procedure is filed, as was the case herein, then the time for appeal shall run from the entry of the order denying

or granting such motion. Accordingly, in the instant matter the time for filing of a valid notice of appeal by plaintiffs began January 30, 1987, the date Judge Polozola entered his order granting defendants' Motion to Alter or Amend Judgment pursuant to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure.

X.

More importantly, Rule 4(a)(4) provides specifically as follows:

> A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing. (emphasis added)

XI.

Accordingly, plaintiffs' original notice of appeal filed on January 27, 1987, is of no effect. They have not timely filed a new and valid notice of appeal after entry of the order granting defendants' Motion to Alter or Amend Judgment on January 30, 1987, as mandated by Rule 4(a)(4) of the Rules of Appellate Procedure. The

delays for filing of a timely and valid notice of appeal have long passed.

XII.

A situation very clearly akin to that involved herein was examined by this Honorable Court in Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc., et al, 746 F.2d 278 (5th Cir. 1984), cert. denied, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). As discussed in Harcon, the requisite for filing of a timely and valid notice of appeal is both mandatory and jurisdictional.

XIII.

Pursuant to the provisions of Rule 4(a)(4) of the Rules of Appellate Procedure, as well as under the holding and guidance of the Harcon decision, plaintiffs' original notice of appeal filed on January 27, 1987, is of absolutely no effect. Accordingly, movers respectfully submit that as the delays for filing of a timely and valid notice of appeal have passed, plaintiffs' present appeal predicated on their original and invalid notice should be dismissed.

WHEREFORE, movers, Stanships, Inc. and Trident Steamship Co., Ltd., pray that the appeal filed by Mercilyn Buchanan, in her individual capacity and as guardian of Andreas Mark Anthony Shaw, should be dismissed by this Honorable Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-3062

USDC #CA 82-128 B

MERCILYN BUCHANAN, Individually
and as Guardian of the Minor
ADREAS MARK ANTHONY SHAW
Plaintiffs-Appellant

versus

TRIDENT SHIPPING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

Before CLARK, Chief Judge, GARWOOD and HILL, Circuit Judges.

BY THE COURT:

The defendants-appellees in this case, Stanships, Inc. and Trident Steamship Co. Ltd., move to dismiss the appeal as untimely. The plaintiffs, Mercilyn Buchanan, et al., filed a timely notice of appeal the day after judgment was entered. Two days later the defendant timely filed a

Motion to Alter or Amend the Judgment to reflect that the defendants were entitled to recover their costs. The district court granted the motion. The plaintiffs did not file any subsequent notice of appeal.

The defendants assert that the appeal must be dismissed because under Rule 4(a)(4) of the Federal Rules of Appellate Procedure a notice of appeal that is filed before final disposition of a motion to Alter or Amend the Judgment is a nullity. A new notice of appeal must be filed following final disposition of the motion.

The plaintiffs assert that the motion in this case should not trigger Rule 4(a)(4) because it was not a legitimate topic for a Rule 59 motion to Alter or Amend the Judgment. They assert that only motions affecting the merits of the judgment, rather than collateral issues such as costs or attorney fees, are proper topics for Rule 59.

Both sides have overlooked the fact that this circuit, in its en banc decision in Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986), established a bright line rule for the application of rule

4(a)(4). As we stated in Harcon:

> Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment ... A bright-line rule is essential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal.

The Harcon rule was applied to motions to Amend the Judgment regarding costs in both Harcon and the companion en banc case, Willie v. Continental Oil Co., 784 F.2d 706 (5th Cir. 1986). Accordingly, the motion of appellees to dismiss the appeal is

GRANTED.

U.S Court of Appeals
Filed April 6, 1987.
Gilbert F. Ganucheau, Clerk

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-3062

MERCILYN BUCHANAN, Individually
and as Guardian of the Minor
ANDREAS MARK ANTHONY SHAW,
Plaintiff-Appellant,

versus

TRIDENT SHIPPING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

Before: CLARK, GARWOOD and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for rehearing, being treated as a motion for reconsideration of the Court's order of April 6, 1987, granting appellees' motion to dismiss is DENIED.

U.S. Court of Appeals

Filed May 11, 1987

Gilbert F. Ganucheau, Clerk

Supreme Court, U.S.
FILED
AUG 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-133

In The
Supreme Court of the United States
October Term, 1987

MERCILYN BUCHANAN, *et al.*,
Petitioner,

vs.

STANSHIPS, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATI COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents do not wish to supplement the questions presented for review set out by petitioner; however, respondents believe a clarification is called for. Specifically, petitioner's repeated characterization of the post-judgment motion involved herein as being a "motion to tax allowable costs pursuant to Fed.R.Civ.P. 54(d)" is improper. Respondents' post-judgment motion clearly and properly was styled as a Motion to Alter or Amend Judgment. More importantly, respondents' motion specifically stated it was "asserted pursuant to the provisions of Rule 52 and Rule 59 of the Federal Rules of Civil Procedure."

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STATEMENT OF JURISDICTION

Respondents agree that this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254; however, respondents respectfully submit that the questions and issues presented for review do not fall within the parameters set forth in Rule 17.1 of the Rules of the Supreme Court.

—o—

STATEMENT OF THE CASE

This matter involved a DOHSA claim filed by the mother and illegitimate minor son of a Jamaican citizen who stowed away aboard the M/V JAYMAT TRIDENT. After trial and post-trial briefing, a minute entry was rendered indicating that plaintiff's claims against defendants would be dismissed. Further, the minute entry stated that written reasons for the Court's ruling would be assigned, and that final judgment would be entered after filing of the written decision. On January 20, 1987, U.S. District Judge Polozola rendered his written decision setting forth the factual and legal findings which supported dismissal of plaintiff's suit. On January 26, 1987, Judgment was entered against plaintiff and in favor of defendants, dismissing the plaintiff's suit with prejudice. The very next day, January 27, 1987, plaintiff filed Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit.

On January 29, 1987, defendants timely filed and served their Motion to Alter or Amend Judgment, along with supporting memorandum, pursuant to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. Specifically, the motion requested that Judge Polozola amend his findings and judgment to award defendants recovery of their costs in an amount to which they legally would be entitled. On January 30, 1987, Judge Polozola granted defendants' motion.

Plaintiff did not file a new Notice of Appeal as required by Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Accordingly, on March 16, 1987, defendants filed their Motion to Dismiss Appeal, which was granted by the Fifth Circuit on April 6, 1987. Thereafter, plaintiff moved the Fifth Circuit for rehearing, which was denied on May 11, 1987.

The Fifth Circuit based its dismissal of plaintiff's appeal on the "bright line" rule it established in *Harcon Barge Co., Inc. v. D&G Boat Rental, Inc., et al.*, 746 F.2d 278 (5th Cir. 1984), *en banc* decision, 784 F.2d 665 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). The *Harcon* decision involved issues and arguments identical to those presented herein, and it established a clear and unambiguous rule of decision in the Fifth Circuit—which since has been followed and approved by numerous other circuits.

—o—

SUMMARY OF THE ARGUMENT

Respondents respectfully submit that the Fifth Circuit's dismissal of plaintiff's appeal was well reasoned, well founded and clearly proper. The rule of law established by the Fifth Circuit in *Harcon* eliminates any ambiguity which might arise out of the fact that Rule 59 and Rule 60 of the Federal Rules of Civil Procedure provide overlapping relief. *Harcon* established a clear "bright line" rule which has been followed and cited with approval by numerous other circuits.

This Honorable Court was confronted with a petition for writ of certiorari in *Harcon* which involved issues and arguments virtually identical to those urged by petitioner herein. This Honorable Court denied the petition for writ of certiorari in *Harcon,* and respondents respectfully submit the instant petition similarly should be denied.

—o—

ARGUMENT

In dismissing plaintiff's appeal, the Fifth Circuit relied upon the "bright line" rule it established in the panel and *en banc Harcon* decisions. *Harcon* dealt with the same issues presented in the instant litigation, and the plaintiff in *Harcon* made precisely the same argument as petitioner herein.

In *Harcon,* one of the defendants filed a timely Motion to Amend Judgment, seeking to have the trial court's judgment amended to reflect that it was not liable for costs. The plaintiff in *Harcon* had filed a Notice of Appeal prior to the filing of the defendant's Motion to Amend Judgment, and filed no new notice of appeal after the trial court ruled on the defendant's motion. Accordingly, the defendant moved to dismiss plaintiff's appeal under Rule 4(a)(4) of the Federal Rules of Civil Procedure, and that motion was granted by the Fifth Circuit. Plaintiff petitioned for rehearing *en banc,* and rehearing was granted. It was on rehearing that the Fifth Circuit established its "bright line" rule in an effort to clear up the ambiguities created by the "overlapping relief" allowed under Rule 59 and Rule 60 of the Federal Rules of Civil Procedure.

Harcon stated that an appellate court cannot waive the defect of a premature notice under Rule 4(a)(4), and if no new notice of appeal is filed, the Court of Appeals lacks jurisdiction over the matter. The Fifth Circuit cited *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d. 225 (1982) for establishing what

it characterized as a rather harsh jurisdictional rule. However, the Court also praised the *Griggs* decision for establishing a "bright line test" which signals lawyers to when a new notice of appeal should be filed. The *Harcon* court stated that the virtue of the clear *Griggs* decision "can be turned to vice" if an equally clear rule is not established to tell lawyers what motions should be considered as triggering the need for a new notice of appeal. The Fifth Circuit carved out a clear rule and compliment to the *Griggs* decision in *Harcon.*

In discussing Rule 59 and Rule 60, the Fifth Circuit in *Harcon* stated as follows:

> It is patent that Rule 59(e) and Rule 60 provide overlapping relief. Motions under Rule 59(e) must be filed and served within ten days, but those listed in Rule 60(a) and (b) may be filed at a later date. When the timeliness not of the motion itself but of a notice of appeal from a judgment is involved, a court is not, however, free to choose under which rule it prefers to consider the motion made. If a motion falls within the scope of Rule 59(e), and it is timely served within ten days after entry of judgment as that rule requires, then the Court must consider it as a Rule 59(e) motion for the purposes of Fed.R.App.P. 4(a)(4), regardless of how it is styled. *Id.* at page 668.

The Court also qualified the aforementioned rule by stating that it should not be applied to motions seeking to correct purely clerical errors and mistakes under Rule 60(a). However, the Fifth Circuit noted that the scope of Rule 60(a) is very limited. *Id.* at page 668. The Court in *Harcon* properly found that the defendant's motion to amend the judgment to correct an award of costs was not a Rule 60(a) motion, even though the defendant specifically did not state in its motion that it was seeking Rule 59 relief. In citing Professor Moore on Procedure, the Court in *Harcon* noted that:

> . . . any motion that draws into question the correctness of a judgment is functionally a motion under Rule 59(e), whatever its label. *Id.* at page 669.

This was the clear and unambiguous state of the law in the Fifth Circuit when the petitioner herein filed her Notice of Appeal to the Fifth Circuit. Respondents' motion sought to alter or amend the Judgment of the trial court, and if necessary, the trial court's reasons for judgment. Respondents' motion specifically stated that it was being brought pursuant to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. The motion was timely filed within ten days of the trial court's Judgment, and there can be no question that it sought relief which would bring this matter within the purview of Rule 4(a)(4) of the Federal Rules of Civil Procedure. In *Harcon,* confusion initially was created because the defendant did not state that it was bringing its motion pursuant to Rule 59; however, in the instant matter the respondents specifically stated they were seeking relief under Rule 52 and Rule 59.

Respondents brought their Motion to Alter or Amend Judgment under Rules 52 and 59 because it appeared that Judge Polozola had exercised his discretion in denying an award of costs. This was not a motion to correct a purely clerical error; rather, it sought to change a presumed error in the substantive judgment of the Court.

As stated by the late Judge Tate in the original panel opinion in *Harcon,* this motion ". . . looks and reads like and *is* a Rule 59(e) motion. . . ." *Harcon,* 746 F.2d 278 (5th Cir. 1984).

The authorities cited by petitioner suggest that the respondents' motion may also have been assertable under some rule other than Rule 59; however, those decisions are inapposite, for exclusivity is certainly not the hallmark of the relief available under Rules 59 and 60. The appropriate inquiry, then, is whether the motion falls within the scope of Rule 59. The Fifth Circuit in *Harcon,* and in the instant litigation, has stated without hesitation that such a motion indeed seeks Rule 59 relief.

The *Harcon* decision and the bright line rule established by it has been followed and cited with approval in numerous other circuits. See *Sheldon v. Unit Rig and Equipment Co.,* 797 F.2d 883 (10th Cir. 1986); *United States v. Eastern Airlines, Inc.,* 792 F.2d 1562 (11th Cir. 1986); *Rados v. Celotex Corp.,* 809 F.2d 171 (2nd Cir. 1986). In fact, the Seventh Circuit has adopted the rule of *Harcon* as the controlling rule of law in that circuit. *Charles v. Daley,* 799 F.2d 347 (7th Cir. 1986). Since the *Harcon* decision in 1986, no circuit has criticized it or failed to follow its rationale.

CONCLUSION

The "bright line" rule of *Harcon* was established to clear up ambiguities and uncertainties which previously had confronted the appellate practitioner. It sought to establish a rule to end "othewise endless hassles over proper characterization" of post-judgment motions, and it did just that. Petitioner is asking this Honorable Court to muddy the "bright line" of *Harcon.* Petitioner seeks re-

lief not because of any ambiguity created by conflicting jurisprudence or rules of law; rather, she seeks relief because she was not familiar with the controlling rule of law in the Fifth Circuit, she did not read the basis for respondents' Motion to Alter or Amend Judgment, and she did not follow the strict—but clear—provisions of Rule 4(a)(4). This petition and argument is identical to that presented in *Harcon,* and as occurred in *Harcon,* respondents' respectfully submit this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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(3)

FILED

DEC 28 1987

JOSEPH F. SPANIOL, JR.
CLERK

No. 87-133

In the Supreme Court of the United States

OCTOBER TERM, 1987

MERCILYN BUCHANAN, ET AL., PETITIONERS

v.

STANSHIPS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that if any party files a timely postjudgment motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, a notice of appeal filed prior to disposition of the motion "shall have no effect." The question presented is whether a postjudgment application for costs by the prevailing party in the district court constitutes a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) and therefore renders a prior notice of appeal invalid under Fed. R. App. P. 4(a)(4).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-133

MERCILYN BUCHANAN, ET AL., PETITIONERS

v.

STANSHIPS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case arises out of a claim brought by petitioners in the United States District Court for the Middle District of Louisiana under the Death on the High Seas Act, 46 U.S.C. (& Supp. III) 761 *et seq.* Following a bench trial, the district court ruled for respondents on January 20, 1987. On January 26, 1987, the district court formally entered a judgment dismissing petitioners' suit with prejudice (Pet. App. 15). The judgment contained no reference to costs.

On January 27, 1987, the day after the entry of judgment, petitioners filed a notice of appeal in the district court pursuant to Rule 3 of the Federal Rules of Appellate Procedure (Pet. App. 16). Two days later, on January 29, respondents filed an application for the allowance of

costs (*id.* at 17). The Federal Rules of Civil Procedure contemplate that the prevailing party will present the clerk of the district court with a bill of costs, which the clerk allows unless the losing party files a motion contesting his liability for costs within five days. See Fed. R. Civ. P. 54(d). Rather than follow this procedure, however, respondents presented the district court here with what they styled a "Motion to Alter or Amend Judgment." The motion asked the district court to amend its judgment of January 26 "to reflect that [respondents] are entitled to recover their taxable costs against [petitioners]." The motion asserted that it was filed "pursuant to the provisions of Rule 52 and Rule 59 of the Federal Rules of Civil Procedure." Pet. App. 17.

The district court issued an order granting respondents' motion on January 30, 1987, three days after petitioners had filed their notice of appeal (Pet. App. 18). Petitioners did not file a second notice of appeal following the district court's disposition of the costs motion. Respondents subsequently filed a motion in the Fifth Circuit seeking dismissal of petitioners' appeal for lack of subject matter jurisdiction (*id.* at 19). Respondents relied on Rule 4(a)(4) of the Federal Rules of Appellate Procedure, which provides in relevant part that if a postjudgment motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) is filed in timely fashion in the district court, the time for appeal shall run from the date of the district court's order disposing of the motion and "[a] notice of appeal filed before the disposition [of the motion] shall have no effect." Respondents contended that their postjudgment motion for the allowance of costs was a Fed. R. Civ. P. 59(e) motion and that, in consequence, petitioners' notice of appeal—which had been filed before the disposition of the motion—was jurisdictionally invalid under Fed. R. App. P. 4(a)(4).[1]

[1] Respondents also asserted that their postjudgment motion had been a Fed. R. Civ. P. 52(b) motion for additional findings of fact.

2. The Fifth Circuit granted respondents' motion and dismissed the appeal (Pet. App. 25-27). The Fifth Circuit based its ruling on its prior decision in *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d 665 (1986) (en banc), cert. denied, No. 85-2015 (Nov. 3, 1986). In *Harcon Barge*, the Fifth Circuit held (784 F.2d at 667) that:

> [A]ny post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed.R.App.P. 4(a)(4).

The Fifth Circuit concluded in the present case, as it had in *Harcon Barge* itself, that a postjudgment motion respecting costs comes within "the unrestricted scope of Rule 59(e)" when filed within 10 days of the entry of judgment (Pet. App. 26-27). Following this approach, the Fifth Circuit concluded that petitioners' notice of appeal, filed prior to the district court's disposition of respondents' motion for costs, is invalid under Fed. R. App. P. 4(a)(4) and therefore does not vest the court of appeals with jurisdiction over the appeal (Pet. App. 26-27.).

DISCUSSION

The Fifth Circuit's decision in this case, which holds that a postjudgment motion for costs filed within 10 days after entry of judgment constitutes a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), is inconsistent both with this Court's decision in *White* v. *New*

Under Fed. R. App. P. 4(a)(4), a Fed. R. Civ. P. 52(b) motion has the same jurisdictional consequences as a Fed. R. Civ. P. 59(e) motion. Respondents' postjudgment motion itself, however, made no request for additional findings. See Pet. App. 17.

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Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982), and with the treatment accorded costs by the Federal Rules of Civil Procedure. The Fifth Circuit's decision directly conflicts with recent decisions of the Ninth and Eleventh Circuits as well. While the underlying jurisdictional issue in this case may not be significant enough to demand plenary consideration by this Court, the Fifth Circuit's decision is sufficiently at odds with this Court's holding in *White* and with the policies of the Federal Rules that summary reversal may be warranted.

1. In *White*, this Court unanimously held that a postjudgment application for attorneys' fees under 42 U.S.C. 1988 does not constitute a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. See 455 U.S. at 450-455. The Court began its analysis in *White* by invoking the prevailing view of the courts of appeals, "[c]onsistent[] with th[e] original understanding" of Fed. R. Civ. P. 59(e), that Rule 59(e) "support[s] [only] reconsideration of matters properly encompassed in a decision on the merits" (455 U.S. at 451). In contrast, the Court noted, "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply" (*ibid.* (footnote omitted)). Because attorney's fees are available under Section 1988 only to "prevailing parties," Section 1988 fee applications "will therefore require an inquiry separate from the decision on the merits" which "cannot even commence until one party has 'prevailed' " (455 U.S. at 451-452). Moreover, attorneys' fees under Section 1988 "are not compensation for the injury giving rise to an action" and therefore cannot be characterized as another "element of 'relief' " (455 U.S. at 452). The Court therefore concluded that " 'unlike a motion to alter or amend a judgment[,]' " an application for attorney's fees " 'does not imply a change in the judgment, but merely seeks what is due *because of* the judgment' " (*ibid.* (emphasis added),

quoting *Knighton* v. *Watkins*, 616 F.2d 795, 797 (5th Cir. 1980)).[2]

In cases like *White*, where the prevailing party's entitlement to attorneys' fees is governed by a separate fees statute rather than by the provision creating the cause of action, the courts of appeals uniformly have held that *White* precludes treating postjudgment attorneys' fee motions as Fed. R. Civ. P. 59(e) motions. See, *e.g.*, *Gordon* v. *Heimann*, 715 F.2d 531, 536-539 (11th Cir. 1983); *Spray-Rite Serv. Co.* v. *Monsanto Co.*, 684 F.2d 1226, 1247-1248 (7th Cir. 1982), aff'd on other grounds, 465 U.S. 752 (1984); *Metcalf* v. *Borba*, 681 F.2d 1183, 1184-1185 (9th Cir. 1982). As a result, the filing of such motions does not affect the timeliness of notices of appeal under Fed. R. App. P. 4(a)(4). See, *e.g.*, *Smillie* v. *Park Chemical Co.*, 710 F.2d 271, 273-274 (6th Cir. 1983).[3]

---

[2] In *Acosta* v. *Louisiana Dep't of Health & Human Resources*, No. 85-1500 (June 30, 1986), the Court summarily affirmed a Fifth Circuit decision that treated a motion seeking reconsideration of an award of attorneys' fees as a Fed. R. Civ. P. 59(e) motion. The issue before this Court in *Acosta*, however, did not involve an original application for attorneys' fees; it involved a motion for reconsideration of a previous order awarding fees. In any event, the Court did not address the question whether a postjudgment motion relating to attorneys' fees may be made under Rule 59(e); instead, the Court simply assumed that a valid Rule 59(e) motion had been made and then addressed the question whether a notice of appeal filed after a district court's announcement of its ruling on a Rule 59(e) motion, but before entry of judgment on that ruling, is valid under Fed. R. App. P. 4(a)(4). *Acosta* therefore does not appear to signal a retreat from *White's* holding that attorneys' fee motions are collateral to the merits.

[3] In cases where attorneys' fees are sought as part of the relief provided by the underlying cause of action, rather than under a separate statute or rule, the courts of appeals have divided over the applicability of *White*. Compare, *e.g.*, *Beckwith Machinery Co.* v. *Travelers Indemnity Co.*, 815 F.2d 286, 288 (3d Cir. 1987) (*White's* reasoning does not apply in cases where the fee "award arises as an integral part of the merits of the dispute," such as where the contract underlying a breach-of-contract claim provides for fees as an element of damages), and

Two courts of appeals, the Ninth and Eleventh Circuits, have found *White*'s reasoning to be controlling in cases involving postjudgment motions that seeks costs rather than attorneys' fees. In *Lucas* v. *Florida Power & Light Co.*, 729 F.2d 1300 (1984), the Eleventh Circuit expressly held that an otherwise timely notice of appeal is not rendered void under Fed. R. App. P. 4(a)(4) by the filing of a postjudgment motion regarding the awarding of costs. Following this Court's reasoning in *White*, the Eleventh Circuit concluded that Fed. R. Civ. P. 59(e) motions involve "matters encompassed in a decision on the merits of the dispute, * * * not matters collateral to the merits" (729 F.2d at 1301). The court of appeals reasoned that a motion for costs does not constitute a Rule 59(e) motion under this standard because it "relates exclusively to the collateral question of what is due because of the judgment" (729 F.2d at 1301 (citing *White*)). The court of appeals noted that although "[t]he narrow issue" in *White* involved attorneys' fees, *White*'s reasoning "applies with equal if not greater force to costs, for costs must certainly be regarded as collateral to the main cause of action in this case" (*id.* at 1301 n.1). The Eleventh Circuit subsequently reaffirmed *Lucas* in *Alimenta (U.S.A), Inc.* v. *Anheuser-Busch Cos.*, 803 F.2d 1160 (1986).

F.H. Krear & Co. v. *Nineteen Named Trustees*, 776 F.2d 1563 (2d Cir. 1985) (same), with *International Ass'n of Bridge & Ironworkers' Local Union 75* v. *Madison Indus.*, 733 F.2d 656 (9th Cir. 1984) (all attorneys' fee requests, including those predicated on a contract underlying the suit, "[are] collateral to [the] main action" under *White*). See generally *Morey* v. *Barrington Press, Inc.*, No. 87-32 (Oct. 13, 1987) (Brennan & White, JJ., dissenting from denial of certiorari) (reviewing cases). This Court recently has granted certiorari in a case presenting this conflict. *Budinich* v. *Becton Dickinson & Co.*, cert. granted, No. 87-283 (Oct. 13, 1987). For reasons set out below, we do not believe it necessary to hold the present petition pending the decision in *Budinich*. See note 5, *infra*.

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In *Durham* v. *Kelly*, 810 F.2d 1500 (1987), the Ninth Circuit reached the same conclusion as did the Eleventh Circuit in *Lucas* and *Alimenta*. The Ninth Circuit held expressly that "a motion to alter or amend a judgment to award costs does not come within Rule 59(e)" and that Fed. R. App. P. 4(a)(4)'s provisions regarding the jurisdictional effects of Rule 59(e) motions therefore "are inapplicable with respect to a request for reconsideration concerning costs" (810 F.2d at 1503). In so holding, the Ninth Circuit pronounced itself "persuaded by the [Eleventh Circuit's] analysis in *Lucas* * * *" (*ibid.*).

2. The Fifth Circuit's decision in this case squarely conflicts with the decisions of the Ninth and Eleventh Circuits in *Lucas*, *Alimenta*, and *Durham*. The Fifth Circuit's decision also cannot be reconciled with this Court's decision in *White*, and is at odds with the treatment of costs under the Federal Rules of Civil Procedure.

a. Under *White*, as we note above, postjudgment applications for attorney's fees do not constitute Fed. R. Civ. P. 59(e) motions, at least where the entitlement to fees is not created by the underlying cause of action. *White*'s reasoning applies with equal force to cases where the prevailing party seeks costs rather than attorney's fees. A request for costs, no less than a request for attorneys' fees, "raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *White*, 455 U.S. at 451 (footnote omitted). Costs under Rule 54(d) of the Federal Rules of Civil Procedure, like attorneys' fees under Section 1988, are allowed only to "prevailing parties." As a result, applications for costs, like applications for attorneys' fees, "will * * * require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.' " 455 U.S. at 451-452.[4] Moreover, costs under

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[4] The award of costs does not follow automatically from a judgment on the merits. Although Rule 54(d) entitles prevailing parties to

Rule 54(d) of the Federal Rules of Civil Procedure, like fees under Section 1988, "are not compensation for the injury giving rise to an action" (455 U.S. at 452). And a postjudgment application for costs, like a postjudgment motion for fees, " 'does not imply a change in the judgment, but merely seeks what is due because of the judgment' " (*ibid.* (quoting *Knighton,* 616 F.2d at 797)). In short, each of the considerations that led this Court to hold Section 1988 fee motions to be outside the scope of Fed. R. Civ. P. 59(e) in *White* applies with equal force to costs that are awarded under Fed. R. Civ. P. 54(d).[5]

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recover costs "unless the court otherwise directs," the district court's express authority to "otherwise direct[]" vests it with discretion over whether to award costs and what costs to award. See, *e.g., Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 352-356 (1981); *Farmer* v. *Arabian Am. Oil Co.,* 379 U.S. 227 (1964). Before this discretion even can be invoked, moreover, the district court may be called on to decide whether the party seeking costs is indeed a "prevailing party." As attorney's fee litigation under Section 1988 and other statutes has shown, the answer to "prevailing party" questions may be less than obvious. See generally *Harris* v. *McCarthy,* 790 F.2d 753, 759-760 (9th Cir. 1986); *Public Law Enforcement Inst.* v. *United States Dep't of Justice,* 744 F.2d 181, 183-184 (D.C. Cir. 1984); *Citizens Coalition for Block Grant Compliance, Inc.* v. *City of Euclid,* 717 F.2d 964, 966-967 (6th Cir. 1983).

[5] If costs were an integral part of the underlying cause of action, their proper status under Fed. R. Civ. P. 59(e) might well turn on this Court's forthcoming decision in *Budinich,* which will address the related question of how *White* applies to attorneys' fees that accrue as part of the underlying claim. See note 3, *supra.* In most cases, however, costs are awarded not by virtue of the underlying cause of action, but instead on the basis of the independent provisions of Fed. R. Civ. P. 54(d). In this case, the Death on the High Seas Act contains no provision regarding costs, which means that respondents' asserted right to costs necessarily is predicated on Rule 54(d) rather than on the Act. As a result, even if it is assumed that a postjudgment motion regarding costs constitutes a Fed. R. Civ. P. 59(e) motion when the entitlement to costs is part and parcel of the underlying claim (as when a contract provides for the award of costs as an element of damages in a contract action), this is not such a case. For that reason, we do not believe that this petition need be held pending the Court's decision in *Budinich.*

Indeed, two Terms after *White* was decided, this Court itself applied *White* to a postjudgment motion involving costs. In *FCC* v. *League of Women Voters,* 468 U.S. 364 (1984), the appellees contested the finality of a district court judgment on the ground that the district court had not disposed of a postjudgment motion concerning both costs and attorneys' fees (*id.* at 373-374 n.10). This Court, relying in part on *White,* held that the pendency of the postjudgment motion did not affect the Court's jurisdiction to consider the appeal pursuant to Rule 11.3 of the Rules of this Court, because the "issue of whether appellees were entitled to recover attorney's fees and costs" was "wholly collateral" to the judgment (*ibid.*). In so holding, the Court treated costs and fees identically for jurisdictional purposes.[6]

b. The case against treating postjudgment requests for costs as Fed. R. Civ. P. 59(e) motions is if anything stronger than the case against so treating postjudgment fee motions. The Federal Rules of Civil Procedure

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[6] The collateral nature of cost issues is further suggested by this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). In *Eisen,* a district court ordered the defendants in a securities class action to bear a portion of the costs of providing notice to class members. This Court ruled that the district court's order was immediately appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). The Court expressly held that the order assigning costs to the defendants "involved a collateral matter unrelated to the merits of [the plaintiff's] claims" (417 U.S. at 172). While the considerations that govern whether an order is "collateral" under the *Cohen* doctrine may not be identical to those governing whether an issue is collateral to the judgment for purposes of Fed. R. Civ. P. 59(e), *Eisen* nonetheless reflects a basic understanding that decisions regarding the allocation of costs are generally distinct from decisions regarding the merits of the litigation.

themselves draw a sharp distinction between the judgment on the merits and an award of costs. Fed. R. Civ. P. 54(d) provides that "[c]osts may be taxed by the clerk on one day's notice" and that, "[o]n motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." Rule 54(d) thus contemplates that applications for costs will be presented in the first instance not to the district judge but to the clerk, and that the district judge will not take up the issue at all unless the losing party makes a timely motion for him to do so. See 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* § 2679, at 396 (2d ed. 1983) (footnote omitted) ("[N]othing normally can come before the court until the clerk has acted and an objection has been made."); Comment, *Taxation of Costs in Federal Court—A Proposal*, 25 Am. U.L. Rev. 877, 881-883 (1976). In turn, Fed. R. Civ. P. 58 provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs." Rule 58, like Rule 54(d), thus "attempts to divorce the process of entering judgment from that of determining and assessing the costs." C. Wright, A. Miller & M. Kane, *supra*, § 2679, at 392; see *Lucas*, 729 F.2d at 1300. In contrast, the Fifth Circuit's decision here treats a routine postjudgment application for costs not as a collateral proceeding following from the judgment, as contemplated by Rules 54(d) and 58, but as a request for modification of the judgment itself.

The Fifth Circuit adopted the jurisdictional rule applied in this case in large part because it believed that a "bright-line" rule would be beneficial to litigants and the courts. See *Harcon Barge*, 784 F.2d at 670. As a general matter, we have no quarrel with the view that bright-line rules are desirable to settle issues of jurisdiction. Indeed, where the Federal Rules of Civil Procedure and Appellate Procedure accommodate them, such principles serve important interests of predictability and judicial economy. But the Fifth Circuit's proposed rule, which—as *White* con-

firms—is not compelled by the language or purposes of Fed. R. Civ. P. 59(e), is not the only construction that provides certainty and predictability in this context. To the contrary, *White* points to an equally clear (if narrower) rule: postjudgment applications for costs predicated on Fed. R. Civ. P. 54(d) are simply not Rule 59(e) motions, regardless of how framed or when filed.[7]

Not only is the Fifth Circuit's rule unnecessary, it may create inequitable traps for the unwary. Under the decision below, whenever the losing party acts promptly to file a concededly valid notice of appeal, the prevailing party can force the losing party to file a second notice of appeal, simply by miscasting a routine motion for costs under Fed. R. Civ. P. 54(d) as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). It is one thing to require a losing party to comply with the strict letter of the rules in order to perfect its right to appeal. Cf. *Acosta* v. *Louisiana Dep't of Health & Human Resources*, No. 85-1500 (June 30, 1986). But it is quite another thing to require the losing party, on pain of forfeiting all right to appeal, to take reparative action because the *prevailing* party has failed to follow the letter of the rules. Such an approach will only encourage procedural irregularity and opportunistic behavior, not the "just, speedy, and inexpensive determination of every action" that the Rules are designed to secure. See Fed. R. Civ. P. 1.

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[7] In any event, the line drawn by the Fifth Circuit may well be less bright than the court below believed. Because the Fifth Circuit felt compelled by Fed. R. Civ. P. 60(a) to carve out an exception for motions filed within 10 days of judgment involving "clerical errors" (see *Harcon Barge*, 784 F.2d at 669-670) the court's rule invites litigation over whether a particular error or omission in a judgment is "clerical" or not. Indeed, inasmuch as Rule 54(d) entitles the prevailing party to costs "unless the court otherwise directs," another court of appeals plausibly might conclude that the omission of costs from the judgment in a case like this one is a clerical error and hence that a motion for costs like the present one should not constitute a Fed. R. Civ. P. 59(e) motion under the Fifth Circuit's general rule.

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3. Because the Fifth Circuit's decision is inconsistent both with this Court's precedents and with the Federal Rules of Civil Procedure, and because the decision creates a conflict among the courts of appeals, review by this Court may be appropriate. We have some doubt, however, that plenary review, as opposed to summary disposition, is warranted.

Of course, the federal judicial system has an interest in the uniform and proper interpretation and application of the Federal Rules of Civil Procedure and Appellate Procedure. As a practical matter, however, the existence of a circuit conflict over the present jurisdictional issue may not result in intolerable confusion or inconvenience for litigants. As long as each court of appeals takes a clear position on the status of postjudgment cost motions under Fed. R. Civ. P. 59(e), litigants may have adequate guidance on how they should proceed to protect their right of appeal in any given circuit. Given the clarity of this Court's reasoning in *White*, moreover, there is reason to doubt that the Fifth Circuit's error in this case will be made by other courts of appeals.[8] In light of the other demands on this Court's time, the issue in this case may not be sufficiently important to claim the Court's plenary attention. For the reasons given above, however, we believe that the correct outcome in this case is clear—sufficiently clear that the Court may find it appropriate to reverse the Fifth Circuit's decision summarily on the basis of *White*.

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[8] Respondents correctly note (Br. in Opp. 6) that in *Charles* v. *Daley*, 799 F.2d 343 (1986), the Seventh Circuit formally adopted the Fed. R. Civ. P. 59(e) standards set forth by the Fifth Circuit in *Harcon Barge*. See *Charles*, 799 F.2d at 347. *Charles* does not make clear, however, whether the Seventh Circuit will apply *Harcon Barge* as expansively as the Fifth Circuit has done in this case. Although *Charles* relied on *Harcon Barge* to classify a postjudgment motion regarding attorneys' fees as a Rule 59(e) motion, the movant in *Charles* was seeking not only to alter a prior fee order but to intervene for the first time as a party defendant as well. See 799 F.2d at 344-347. In this and other respects, the motion at issue in *Charles* was more closely tied to the merits of the judgment than would be a conventional postjudgment application for attorneys' fees or costs.

No other court of appeals decision has followed *Charles* in adopting *Harcon Barge*. The other decisions noted by respondents (Br. in Opp. 6) have cited *Harcon Barge* only for the general (and unexceptionable) proposition that timely postjudgment motions seeking reconsideration of the correctness of the judgment come within the scope of Rule 59(e). See, *e.g.*, *Skagerberg* v. *Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986) (citing *Harcon Barge* for proposition that "a [timely] postjudgment motion * * * that questions the correctness of a judgment is properly construed as a [Rule 59(e)] motion to alter or amend judgment").

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals summarily reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

MERCILYN BUCHANAN ETC. *v.* STANSHIPS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-133. Decided March 21, 1988

PER CURIAM.

Federal Rule of Appellate Procedure 4(a)(4) provides that if any party files a timely motion "under Rule 59 [of the Federal Rules of Civil Procedure] to alter or amend the judgment," then the time for appeal "shall run from the entry of the order . . . granting or denying" such a motion. The Rule specifically indicates that a notice of appeal filed before the disposition of such a motion "shall have no effect" but that a "new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." In this case, we are asked to determine whether a prevailing party's motion for costs constitutes a Rule 59 motion and thereby renders ineffective a notice of appeal filed prior to the disposition of that motion.

I

Petitioners, a widow and her minor child, brought this wrongful death action against respondents in the United States District Court for the Middle District of Louisiana under the Death on the High Seas Act, ch. 111, 41 Stat. 537, 46 U. S. C. § 761 *et seq.* The court initially granted summary judgment for respondents, but the Court of Appeals for the Fifth Circuit reversed this ruling. 744 F. 2d 1070 (1984). On remand, the District Court conducted a bench trial. Then, on January 26, 1987, the court entered judgment in favor of respondents, dismissing petitioners' suit with prejudice. Pet. for Cert. 15. The judgment made no mention of costs. The next day petitioners filed a notice of appeal in the

District Court pursuant to Federal Rule of Appellate Procedure 3. *Id.*, at 16.

On January 29, 1987, respondents filed an application for the allowance of costs, styled as a "Motion to Alter or Amend Judgment." *Id.*, at 17. The motion asked that the District Court "amend its judgment" to reflect that respondents were "entitled to recover their taxable costs," and specifically invoked Rule 59 of the Federal Rules of Civil Procedure. *Ibid.* The District Court issued an order granting respondents' request the next day. *Id.*, at 18.

Petitioners did not file a second notice of appeal following the District Court's order granting respondents' motion. Respondents subsequently moved the Court of Appeals to dismiss petitioners' appeal for lack of subject matter jurisdiction due to failure to file a timely notice of appeal. *Id.*, at 19. Respondents argued that Rule 4(a)(4) of the Federal Rules of Appellate Procedure rendered petitioners' first notice of appeal void because the motion for the allowance of costs was a Rule 59(e) motion. Relying on its prior decision in *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F. 2d 665 (CA5 1986) (en banc), cert. denied, 479 U. S. —— (1986), the Court of Appeals agreed and dismissed petitioners' appeal. Pet. for Cert. 25. See also *Charles* v. *Daley*, 799 F. 2d 343, 347 (CA7 1986) (adopting the analysis of *Harcon Barge*). Petitioners seek certiorari, noting that the Court of Appeals' decision is in tension with our decision in *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445 (1982), and in conflict with decisions of the Ninth Circuit and the Eleventh Circuit, see *Durham* v. *Kelly*, 810 F. 2d 1500 (CA9 1987); *Alimenta (U. S. A.), Inc.* v. *Anheuser-Busch Cos.*, 803 F. 2d 1160 (CA11 1986); *Lucas* v. *Florida Power & Light Co.*, 729 F. 2d 1300 (CA11 1984).

II

Federal Rule of Civil Procedure 59(e) concerns "motion[s] to alter or amend the judgment." The Rule requires that

such motions be filed within 10 days of the initial entry of judgment. "[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White*, *supra*, at 451. In *White*, we held that a motion for attorney's fees under 42 U. S. C. § 1988 was not a Rule 59(e) motion. We reasoned that because § 1988 provides for fees independently of the underlying cause of action and only for a "prevailing party," a motion for fees required an inquiry "separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" 455 U. S., at 451–452. Cf. *Budinich* v. *Becton Dickinson & Co.*, 807 F. 2d 155 (CA10 1986) cert. granted 484 U. S. —— (1987) (presenting issue of whether a different rule applies when fees are not provided for independently, as by § 1988, but as an aspect of the underlying action). Such a motion therefore "'does not imply a change in the judgment, but merely seeks what is due *because of* the judgment.'" 455 U. S., at 452 (emphasis added) (quoting *Knighton* v. *Watkins*, 616 F. 2d 795, 797 (CA5 1980)).

Respondents' postjudgment motion for costs similarly sought only what was due *because of* the judgment. Because the Death on the High Seas Act contains no provision regarding costs, respondents' motion for costs necessarily was predicated on Federal Rule of Civil Procedure 54(d). Assessment of such costs does not involve reconsideration of any aspect of the decision on the merits. Under Rule 54(d), the "prevailing party" automatically is entitled to costs "unless the court otherwise directs." Indeed, the Rule contemplates that applications for costs will be presented in the first instance not to the court but to the clerk; a district judge need not take up the issue at all unless the losing party makes a timely motion for judicial review. Fed. Rule Civ. Proc. 54(d) ("On motion served within 5 days [after the clerk's taxing of costs] the action of the clerk may be reviewed by the court."); 10 C. Wright, A. Miller, & M. Kane, *Federal Prac-*

tice and Procedure § 2679, p. 396 (2d ed. 1983). A sharp distinction between the judgment on the merits and an award of costs under Rule 54(d) also is evident in Rule 58's instruction that "[e]ntry of the judgment shall not be delayed for the taxing of costs." Thus it is apparent that the rules "attemp[t] to divorce the process of entering judgment from that of determining and assessing the costs." 10 Wright, Miller, & Kane, *supra*, § 2679, p. 392.

While a different issue may be presented if expenses of this sort were provided as an aspect of the underlying action, we are satisfied that a motion for costs filed pursuant to Rule 54(d) does not seek "to alter or amend the judgment" within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply. *White*, *supra*, at 451. Cf. *FCC* v. *League of Women Voters*, 468 U. S. 364, 373–374, n. 10 (1984) (issue of entitlement to "attorney's fees *and costs*" described as "wholly collateral" to judgment on the merits) (emphasis added); *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 172 (1974) (order assigning costs held immediately appealable under the "collateral order" doctrine because it "involved a collateral matter unrelated to the merits"). Respondents' inaccurate designation of their costs request as a Rule 59 motion cannot change this fact. Nor can respondents' incorrect label deprive petitioners of the benefit of their timely notice of appeal. Because respondents' motion, properly viewed, was a Rule 54(d) motion for costs rather than a Rule 59 motion to alter or amend a judgment, petitioners' notice of appeal was timely under the Federal Rules of Appellate Procedure.

Certiorari is therefore granted, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

MERCILYN BUCHANAN ETC. *v.* STANSHIPS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-133. Decided March 21, 1988

JUSTICE MARSHALL, dissenting.

I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to decide a case summarily without the benefit of full briefing on the merits of the question decided. See *Commissioner* v. *McCoy*, 484 U. S. ——, —— (1987) (MARSHALL, J., dissenting); *Montana* v. *Hall*, 481 U. S. ——, —— (1987) (MARSHALL, J., dissenting). The Rules of this Court encourage litigants filing petitions for certiorari to address whether plenary consideration of the case is appropriate and discourage detailed discussions on the merits. The respondent in this case followed that advice. Respondent filed a seven-page brief in opposition to the petition for certiorari, of which only four pages dealt with the issue whether a prevailing party's motion for costs constitutes a Federal Rule of Civil Procedure 59(e) motion to alter or amend judgment. Respondent relied almost exclusively on the Fifth Circuit's unanimous en banc decision in *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F. 2d 665 (1986), which this Court had declined to review. 479 U. S. —— (1986). The Fifth Circuit's decision in this case, applying the "bright line rule" of *Harcon*, Pet. for Cert. 26, undoubtedly benefited from full briefing, something the Court today decides is unnecessary for its determination that the Fifth Circuit was wrong. It is my ongoing view that when the Court is considering a summary disposition of a case, it should at a minimum so inform the litigants and invite them to submit supplemental briefs on